June 17, 2022

Vanessa A. Countryman,
Secretary,
Securities and Exchange Commission
100 F St., NE
Washington, D.C. 20549

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors, RIN 3235—AM87, File Number S7-10-22

Dear Ms. Countryman:

I write to address a single question: whether the Securities and Exchange Acts authorize finalization of the above-captioned proposal in light of the grave constitutional questions that such authorization would raise.

"[I]t is a cardinal principle of statutory interpretation … that when an Act of Congress raises a serious doubt as to its constitutionality," the statute is to be construed to avoid the constitutional question when such "a construction of the statute is fairly possible."[1] Here, the construction of the Securities and Exchange Acts that would be necessary to sustain the proposal would raise just such a serious doubt, namely, whether the Acts impermissibly delegate legislative authority without an intelligible principle to guide the Commission. Because an alternative construction of the statutes that gives the Commission the requisite intelligible principle is readily available, the constitutional avoidance canon requires reading the Acts to contain such a principle—and that principle, in turn, makes clear that the proposal lies outside the bounds of the Commission's authority.

The Constitution vests all federal legislative authority in Congress. Because it "permits no delegation" of that authority, legislation conferring rulemaking power on an agency must "lay down … an intelligible principle to which the person or body authorized to [act] is directed to conform."[2] The Supreme Court has articulated a permissive test for whether an intelligible principle exists; under that permissive approach, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[3] In recent years, some members of the Court have argued

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[1] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks omitted).

[2] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (alteration in original; internal quotation marks omitted).

[3] *Id.* (internal quotation marks omitted).

that the Court should "revisit" its non-delegation precedent,[4] and I agree that it should. But even under the Court's existing case law, the view of the Acts on which the proposal depends lacks an intelligible principle.

The Court articulated its current approach to non-delegation in a case involving the Commission, explaining that a statute is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[5] It is clear that the Acts do limn at least one such "general policy" where investors are concerned: ensuring the disclosure of information that is material to a reasonable investor.[6]

But the proposal depends on the proposition that this principle is not the Acts' only guiding directive where investors are concerned, for the materiality principle cannot sustain the proposal. Indeed, the Commission does not argue to the contrary. It nowhere asserts that the vast array of climate-related information it demands is all material. In fact, it expressly demands the disclosure of scopes 1 and 2 information *without regard* to its materiality.[7] It further makes clear that it does not consider itself bound by the materiality standard by asking whether it should require disclosure of scope 3 emissions even when they are not material.[8] The goal of providing information that is material to the reasonable investor therefore cannot be an intelligible principle that justifies the proposal.

The proposal heavily relies for its rationale on what it terms "growing investor demand" for climate-related disclosures.[9] The Commission admits that it "consider[ed] such investor demand in" issuing the proposal.[10] But if investor demand is the intelligible principle on which the Commission relies, that reliance must fail, for the fact that some persons want a particular policy is not a principle capable of giving any meaningful guidance to agency action. Millions of Americans invest; because Americans have widely varying views and priorities, they also would like to see widely varying information in disclosures. But it is impossible to require disclosure of every piece of information that every investor would like to see; such an approach would be crushingly expensive and would drown investors in information that most of them do not wish to see. The Commission therefore must choose which information, among all the information that any investors would like to see, must be disclosed. It therefore must have a

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[4] *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

[5] *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

[6] *See, e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

[7] *See* 87 Fed. Reg. 21334, 21377 (2022).

[8] *Id.* at 21381.

[9] *Id.* at 21340.

[10] *Id.* at 21337.

reason to choose which investor desires for disclosure to heed—and the mere fact of investor desire cannot guide that choice.

Moreover, on any but the most trivial questions of public policy, affected persons will take positions on both sides of the issue. The docket for this rulemaking illustrates the point: while some investors do indeed favor additional climate-related disclosures, others do not. The mere fact of investor desire is therefore not enough to guide the Commission's action; it needs an additional reason to guide it as it chooses whether to favor the investors who want a particular disclosure or those who do not.

If the Commission is free to select, in its sole discretion, which among the practically infinite array of investor desires it will heed, then the Securities and Exchange Acts lack an intelligible principle to guide the Commission in determining what information registered companies must disclose. Congress exists to choose which desires, among the countless number enjoying some sway among the public, are to be given effect in law; farming out that most quintessentially legislative task to the Commission would be a delegation impermissible under Article I of the Constitution.

On the proposal's apparent view of the Acts, there is no limit to the information the Commission may demand so long as some investors somewhere would like to see it. Nor does the proposal offer a limiting principle that the Commission could use to choose among investor demands for information. For instance, the proposal does not purport to show that most investors want the new disclosures that the Commission proposes. Even if numerosity were a permissible intelligible principle, the Commission has not invoked it here or laid the factual predicate that could permit its invocation to sustain the proposal.

It may be that the Commission believes the Acts' guiding directive is not what investors want, but rather what is good for investors. But that directive fares no better as an intelligible principle, for it would leave the Commission unchanneled discretion to decide what is good for investors. Under the Court's current case law, Congress need not specify "how much" of a particular good or harm the agency should pursue or avoid.[11] But a congressional failure to specify *which* (arguable) goods the agency should pursue would be a different matter entirely and would amount to a failure to articulate the "general policy" that the non-delegation doctrine demands.

The Commission does not offer another intelligible principle that could sustain the proposal. It does not, for instance, point to any *sui generis* provisions of the Acts, such as Exchange Act § 13(p)'s required disclosure of information about the sources of certain minerals, that appear designed to serve purposes other than the protection of investors. Indeed, the Commission bases the proposal on the assertion that it "would protect investors,"[12] so any other such provisions that may create goals unrelated to investor protection are irrelevant here.

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[11] *See Whitman*, 531 U.S. at 475.

[12] 87 Fed. Reg. at 21335.

Thankfully, Congress did not leave the Commission without guidance in crafting disclosures; at the very least, a fair construction of the securities laws that offers such guidance is available. That guidance consists of the materiality standard, which the Court has found in various provisions of the securities laws.[13] To avoid the constitutional issues that would be raised by reading the Acts to authorize the Commission effectively to require any disclosures it pleases, the Acts should be read to authorize the Commission to demand only disclosure of material information (except to the extent that disclosures may be warranted to achieve any purposes of the Acts unrelated to the protection of investors).

This intelligible principle is consistent with the text of Securities Act § 7, which authorizes the Commission to specify that registration statements "shall contain such … information … as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."[14] This provision need not be read to authorize the Commission to require any disclosures that it decides would further any interests of any investors. Instead, it may be read to require disclosures that would protect investors *as investors*, that is, as those who seek to profit from their investments.[15] The only information that is relevant to that objective is information relevant to risks and returns, that is, material information. The materiality standard is likewise consistent with all the other statutory sources of authority that the Commission cites.

For the reasons given above, concluding that the relevant intelligible principle of the Acts is the goal of making material information available to investors would render the proposal unlawful, because the proposal would demand a vast quantity of immaterial information. Therefore, the Commission should not finalize the proposal. If the Commission nevertheless elects to finalize the proposal, it must make abundantly clear the intelligible principle that in its view both renders the Acts lawful and authorizes the proposal and all its requirements.

Sincerely,

Paul J. Ray

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[13] *See, e.g.*, *Basic*, 485 U.S. 224; *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

[14] § 7(a)(1). As noted, the Commission expressly invokes the protection of investors as its rationale, so any rationales related the furtherance of the "public interest," *id.*, but unrelated to investor protection are of no concern here.

[15] *See, e.g.*, *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).